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No. 07-539

IN THE

Supreme Court of the United States

PROGRESS ENERGY, INC.,

Petitioner,

v.

BARBARA TAYLOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* NORTH CAROLINA RETAIL MERCHANTS ASSOCIATION IN SUPPORT OF PETITIONER

THOMAS J. WALSH, JR.
FORD & HARRISON LLP
795 Ridge Lake Blvd.
Suite 300
Memphis, TN 38120-9475
(901) 291-1500

EDMUND J. MCKENNA
Counsel of Record
FORD & HARRISON LLP
101 East Kennedy Blvd.
Suite 900
Tampa, FL 33602-5133
(813) 261-7800

Attorneys for Amicus Curiae
North Carolina Retail Merchants Association

212542

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The North Carolina Retail Merchants Association (NCRMA) moves the Court, pursuant to S. Ct. R. 37.2, for leave to file a brief as amicus curiae in support of the petition by Progress Energy, Inc. (Petitioner) for writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

As set forth in more detail under Interest of Amicus Curiae in the attached brief, NCRMA is a non-profit trade association whose membership includes more than 25,000 retail stores across the State of North Carolina. Many of its members are covered by the FMLA and have an immediate and direct interest in the issue before the Court. Petitioner has consented to the filing of this brief. Respondent has not returned voice mail messages left for her counsel on November 16 and 19, 2007, and has therefore not granted her consent, necessitating this motion.

NCRMA's brief will assist the Court in determining whether to grant certiorari because it will (1) explain some of the severe practical consequences of the Fourth Circuit's approach if left intact; and (2) invite the Court to revisit its prior FLSA decisions with respect to waiver of claims, older decisions on which the Fourth Circuit relied but which the Court should now re-examine in light of changing relationships between employees and employers in the contemporary workplace.

Respectfully submitted,

THOMAS J. WALSH, JR.
FORD & HARRISON LLP
795 Ridge Lake Blvd.
Suite 300
Memphis, TN 38120-9475
(901) 291-1500

EDMUND J. MCKENNA
Counsel of Record
FORD & HARRISON LLP
101 East Kennedy Blvd.
Suite 900
Tampa, FL 33602-5133
(813) 261-7800

Attorneys for Amicus Curiae
North Carolina Retail Merchants Association

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INTEREST OF AMICUS CURIAE[1]

The North Carolina Retail Merchants Association (NCRMA) is a non-profit trade association organized in 1902 to improve the business climate for retail merchants in North Carolina. Today, NCRMA serves as the voice of the retail industry in North Carolina. NCRMA represents the interests of individual merchants before the members of the North Carolina General Assembly and functions as a vital link to state government. Its credibility lies in its longevity, and its commitment to continuing to serve its members' ever-changing needs.

The NCRMA's membership includes more than 25,000 stores from across the State of North Carolina, businesses representing seventy-five percent of North Carolina's retail sales volume. NCRMA serves both large and small retailers from multi-state chains to locally owned retail outlets, and all types of merchants, including antique, apparel, art, automotive, book, carpet, department, drug, electronics, floral, furniture, grocery, hardware, jewelry, paint and variety stores.

NCRMA is a tax-exempt organization supported entirely by members' dues and governed by a forty-four-member board of directors. Board members represent

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1. The Petitioner has consented to the filing of this brief. Respondent has not responded to telephone messages requesting permission to file this brief. *Amici* has thus moved for the Court's permission to file it. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission.

the wide variety of retailers who do business in North Carolina. They are also selected to represent the different geographic areas of the state with representation in every county in the state.

Many of NCRMA's members are employers covered by the Family and Medical Leave Act ("FMLA") of 1993, 29 U.S.C. §§ 2601 *et seq.*, and by other labor and employment statutes and regulations. As employers and representatives of employers who are potential defendants in FMLA and other employment-related lawsuits, the *amici's* members have a significant interest in preserving effective, knowing and voluntary means of resolving both actual and potential claims without the costs, risks, and other burdens associated with federal administrative proceedings and litigation. NCRMA's members therefore have an immediate and direct interest in the issue before this Court.

REASONS FOR GRANTING THE PETITION

I. Introduction

In a split decision,[2] two members of the Fourth Circuit's panel below held that under a Department of Labor (DOL) regulation, 29 C.F.R. § 825.220(d), employees and employers cannot settle FMLA claims retrospectively, specifically, that they cannot for consideration enter into a knowing and voluntary release of any actual or potential claims of past FMLA violations, without a court or the DOL intervening.

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2. *Taylor v Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007).

This holding relies on older FLSA precedent which the Court should now revisit.

Further, the Fourth Circuit's holding directly conflicts with that of other federal courts' well-reasoned decisions.[3] Moreover, it rejects the DOL's interpretation of its own regulation.[4]

The existing conflict places employees as well as employers on the horns of a legal and practical dilemma, especially in situations where both parties desire an amicable end to the employment relationship. This Court needs to resolve this conflict among the federal courts as well as with the federal agency charged with enforcing FMLA, and to dispel the unnecessary complexity and uncertainty that the Fourth Circuit panel has injected into employer-employee relations.

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3. *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003); *Dougherty v. TEVA Pharms. USA, Inc.*, Civ. Action 05-2336, 2007 U.S. Dist. LEXIS 27200, 12 Wage & Hour Cas. 2d (BNA) 1252 (E.D. April 9, 2007); *see also* decisions that do not address the DOL regulation explicitly but reach the result urged here, *e.g.*, *Halvorson v. Boy Scouts of Am.*, No. 99-5021, 2000 U.S. App. LEXIS 9648 (6th Cir. May 3, 2000); *Schoenwald v. ARCO Alaska, Inc.*, No. 98-35195, 1999 U.S. App. LEXIS 20955 (9th Cir. August 30, 1999). The dissenting member of the Fourth Circuit panel below, Judge Duncan, would have followed this Court's admonition by deferring to the DOL's interpretation of its own regulation. *Taylor*, 493 F.3d at 463-464, citing, *inter alia*, *Auer v. Robbins*, 519 U.S. 452 (1997) and *Long Island Care at Home, Ltd. v. Coke*, __ U.S. __, 127 S. Ct. 2339 (2007).

4. *See* DOL, C.A. Amicus Brief 1-15.

II. The Court Should Reconsider FLSA Precedent Regarding Retrospective Waiver.

This case offers the Court an opportunity to revisit two of its Fair Labor Standards Act (FLSA) decisions which the Fourth Circuit cited and relied upon at 493 F.3d 457-460, *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945) and *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981). For reasons discussed elsewhere, decisions under Title VII and the ADEA (rulings which acknowledge that retrospective waivers of employment claims *are* permitted under those statutes) present a more apt analogy to FMLA cases than do FLSA cases. But the Fourth Circuit's underlying reliance on FLSA precedent, however misplaced, presents this issue for this Court's consideration.[5]

In *Brooklyn Sav. Bank* this Court held that an employee's claim for liquidated damages for past FLSA violations is a statutory right that parties to a settlement agreement cannot waive. The Court conceded that

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5. Lower federal courts have already declared superseded or have called into question the ongoing vitality of various aspects of *Brooklyn Sav. Bank* and *Barrentine*. *See, e.g., Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996); *Sneed v. Sneed's Shipbuilding, Inc.*, 545 F.2d 537, 539 (5th Cir. 1977); *O'Connor v. United States*, 50 Fed. Cl. 285, 294 (2001), *aff'd in part, rev'd in part*, 308 F.3d 1233 (Fed. Cir. 2002); *Walker v. Countrywide Credit Ind.*, Civ. Action No. 3:03-CV-0684-N, 2004 U.S. Dist. LEXIS 30477 at * 13-16 (N.D. Tex. January 15, 2004); *Albertson's Inc. v. United Food & Comm'l Workers*, Civ. No. 96-0398-S-BLW, 1997 U.S. Dist. LEXIS 4554 at *27 and *36-38 (March 10, 1997), *aff'd*, 157 F.3d 758 (9th Cir. 1998), *cert. denied*, 528 U.S. 809 (1999); *Torreblanca v. Nass Foods, Inc.*, No. F 78-163, 1980 U.S. Dist. LEXIS 13893 at *7 (N.D. Ind. February 25, 1980).

"[n]either the statutory language, the legislative reports nor the debates indicates that the question at issue was specifically considered and resolved by Congress." *Id.*, 324 U.S. at 705-706. From that legislative silence, however, the Court drew the lesson that "[i]n the absence of evidence of specific Congressional intent, it becomes necessary to resort to a broader consideration of the legislative policy behind this provision as evidenced by its legislative history and the provisions in and structure of the Act." *Id.* at 706. The Court concluded, "Such consideration clearly shows that Congress did not intend that an employee should be allowed to waive his right to liquidated damages." *Id.*

The dissenting Justices in *Brooklyn Sav. Bank* bluntly disagreed: "We find nothing in the Fair Labor Standards Act to prevent the effective operation of such a release upon the cause of action for liquidated damages more than any other." *Id.*, 324 U.S. at 716.

In *Barrentine* the Court also considered the relationship between statutory rights and private parties' contracting rights in the FLSA context. Specifically, the majority held in *Barrentine* that employees' FLSA action for unpaid time was not barred by the prior, unsuccessful submission of their wage claim to a joint employer-union grievance committee. The Court reasoned that the FLSA rights in question were independent of the collective bargaining process insofar as they devolved upon the employees as individual workers rather than as members of a collective organization.

Once again the majority's view drew vigorous dissent. The two dissenting Justices in *Barrentine*, Chief Justice Burger and then-Associate Justice Rehnquist, noted that the wage dispute in question fell well within the scope of countless work contracts around the country. *Barrentine*, 450 U.S. at 746-752. The dissenters observed that the majority's holding amounted to "ignoring the objective of Congress, the agreement of the parties, and the common sense of the situation." *Id.* at 746. They noted that the majority's decision "moves toward making federal courts small claims courts contrary to the constitutional concept of these courts having special and limited jurisdiction." *Id.*

The reasoning of the dissenting Justices in *Brooklyn Sav. Bank* and *Barrentine* holds even truer in the context of today's workplace realities. In times past, relationships between employers and employees tended to be characterized by starkly unequal bargaining power. This fact of life propelled the courts to reach out as the sole or primary protectors of employees' rights, and to create rules in the absence of Congressional action.

Today, by contrast, a great many federal statutes extend rights to employees, and (as in this case) those statutes typically invest federal administrative agencies with investigatory and enforcement authority, in addition to the power to promulgate regulations. Moreover, employees today tend to be more attuned to their legal rights, and these same employment statutes usually give employees access to agencies as well as courts for redress of grievances. Generally aware of such rights and mechanisms, employees often take advantage of their right to consult legal counsel before signing

settlement agreements, releases, or any other contracts affecting their rights.

Given these realities of the modern workplace, an employee should be able, without agency or court supervision, to waive claims retrospectively — whether claims under Title VII, FLSA, ADEA, or FMLA — absent an express Congressional ban on waiver, as long as the waiver is knowing and voluntary. Especially should this be true where the employee is represented by counsel.

The Court performed a similar analysis in an analogous setting, the question of whether parties could use a mutually-agreed-upon private resolution mechanism (in that instance, arbitration) to resolve employees' claims of statutory violations. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Court unanimously held that Article III judges and representative juries were uniquely suited to, and protective of, workers' statutory civil rights. The Court held that the arbitral process—less formal, with limited discovery, and focused on contractual rights rather than public rights—was not suited for that purpose. But a decade later, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) the Court had come to the view that the arbitral forum was presumptively competent to resolve certain statutory claims of this nature, as long as there had been a valid agreement to arbitrate and the statute did not preclude arbitration.

In its later opinion the Court recognized that the law must respond to changing times and circumstances, noting that "we are well past the time when judicial

suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi*, 473 U.S. at 626-627.

Similarly, the Court should take into account changing circumstances since its earlier rulings with respect to private resolution of pre-existing FLSA claims. If in this modern era competent parties wish to agree to resolve their actual or potential differences for the exchange of valuable consideration, absent a legislative or constitutional ban they should be allowed to do so.

Additional practical considerations, discussed below, reinforce these conclusions.

III. Other Practical Considerations Also Dictate Review.

As all agree, in enacting the FMLA, Congress was silent on the point at issue here. It left such matters to the discretion of the DOL, the agency to which Congress granted investigatory and enforcement authority, 29 U.S.C. §§ 2616, 2617, and which Congress empowered to promulgate regulations necessary to carry out the Act. 29 U.S.C. § 2654. Essentially ignoring both Congress and the DOL, in its ruling below the Fourth Circuit has engrafted its own rules onto the statute. The Fourth Circuit's unwarranted foray into agency rulemaking, if left intact, would give rise to many serious practical problems.

Literally tens of thousands of employers routinely provide terminated employees with severance agreements, especially for employees whose positions have been eliminated through reductions in force, of which there have been large numbers in recent years.[6] Such severance agreements typically include cash consideration for the employee, along with other benefits, in exchange for which the employee agrees to release any actual or potential claims against the employer.[7] Indeed, the release at issue in this case contains these common elements.

A signal advantage of such agreements for employers, as well as for departing employees, is that they provide security. Employees receive the security of compensation and benefits to which they would not otherwise be entitled. This support helps individuals in those situations bridge the gap from one job to the next. In turn it often relieves, at least partly, the public sector from having to expend taxpayer money for this purpose. For their part, employers receive the security of diminished prospects for future litigation, and a concomitantly greater ability to formulate reliable business plans and budgets. In short, for employer and

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6. *Local Union No. 1992 of the Int'l Bhd of Elec. Workers v Okonite Co.*, 189 F.3d 339, 348 (3d Cir. 1999) (Rosenn, J., dissenting); Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 Mich. L. Rev. 867, 883 (March 2007).

7. David E. Nagle, *Fourth Circuit: Waiver of FMLA Rights Requires DOL or Court Approval*, 17 Va. Emp. L. Letter (Aug. 2005); David K. Haase & Emma Sullivan, *The Pitfalls of Releases*, Nat'l L. J. Oct. 23, 2006, at 16.

employee alike, it creates a clean break and a chance for a fresh start.[8]

These agreements also comport with oft-emphasized federal policy favoring the settlement of existing workplace disputes. *See, e.g., Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991); *Carson v. American Brands, Inc.*, 450 U.S. 79, 87 (1981) (noting that such agreements can help "avoid the costs and uncertainties of litigation"). Indeed, federal courts have themselves instituted programs for mediation or arbitration of matters in controversy before them. Even at the appellate stage, federal circuit courts of appeals have codified in their rules various formal procedures which encourage the amicable resolution of matters on appeal. If it is desirable privately to settle a controversy at the appellate stage, after the parties and courts have devoted substantial resources to its resolution, it follows that a much more desirable outcome would be to permit the parties themselves to reach an amicable and mutually satisfactory agreement at an early stage, before these additional expenses are incurred.

Similarly, public policy favors enforcement of waivers in the context of analogous employment claims. *Faris*, 332 F.3d at 321; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-29 (1991); *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 515-516 (1986); *Carson, supra.*

By contrast, the Fourth Circuit panel's approach discourages the private settlement of claims. An estimated seventy-six million American employees enjoy FMLA protection. 71 Fed. Reg. 69504, 69511 (Dec. 1, 2006). In 2005,

8. Carol Wong, *Note: The Family and Medical Leave Act: To Waive or Not to Waive*, 2007 U. Ill. L. Rev. 1567, 1579-80 (2007).

as many as thirteen million workers took leave for reasons covered by the FMLA. 71 Fed. Reg. 69511. If employers could not know for sure that they could achieve closure and avoid the trouble and expense of future FMLA litigation by entering into a settlement and release with a departing employee, they would be far less likely to offer the employee much if any consideration in return for the employee executing a release. Laid-off employees would thereby lose a significant benefit they now often enjoy.[9]

Retail merchants, such as those represented by the North Carolina Retail Merchants Association, suffer from high turnover. DOL Bureau of Labor Statistics (*http://www.bls.gov/oco/ocos121.htm*). Faced with such a situation, retail employers need a simple, inexpensive way to resolve issues with employees. The Fourth Circuit's decision fails to take these and other practical needs into account.[10]

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9. *See, e.g.*, Carol Wong, *supra*, 2007 U. Ill. L. Rev. at 1579-80; Womble Carlyle Sandridge & Rice, PLLC, *Court Makes It Hard to Settle FMLA Claims*, North Carolina Employment Law Letter (August 2005) (noting that the 4th Circuit's *Taylor* decision will make employers less willing to pay severance to laid-off employees); Ann Mennell, *4th Circuit Rules FMLA Waiver Invalid Without Court of DOL Approval*, Business and Management Practices (Aug. 16, 2005) ("This case is troubling in that it undermines the finality that an employer expects to receive in exchange for a severance payment." The author suggests employers may wish to offer less in severance pay due to this uncertainty.)

10. *See, e.g.*, Muniza Bawaney, *Signed General Releases May Be Worth Less than Employers Expected: Circuits Split on Whether Former Employee Can Sign Release, Reap Its Benefit, and Sue for FMLA Claim Anyway*, 82 Chicago-Kent Law Review 525 (2007) (endorsing the 5th Circuit's holding in

(Cont'd)

Beyond these problems, the Fourth Circuit's approach calls into question the validity of countless settlement agreements and releases to which employers and employees have agreed in the past, injecting further uncertainty into individual lives and into the commercial life of the nation.

In addition to the practical obstacles the Fourth Circuit's rule would create for employees and employers, the approval scheme which the Fourth Circuit envisions—one which, as stated, the court below created with no specific statutory basis, and over the opposition of the agency itself—would unduly burden the already over-burdened federal courts as well as the DOL.

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Faris and concluding that the 4th Circuit's Panel approach is "inconsistent," "troubling," "impractical," and "inefficient"); Earl M. Jones, III, Jason R. Dugas, and Jennifer A. Youpa, *Annual Survey of Texas Law: Employment Law*, 59 SMU L. Rev. 1211 (Summer 2006) (4th Circuit Panel's "startling" decision "takes away employers' security of knowing that a settlement is final and binding."); Jeffrey J. Kros, *Courts Split on FMLA Waivers*, Workspan (Oct. 1, 2005) (4th Circuit's "surprising" decision in conflict with other authorities "leaves many HR practitioners caught in the middle, wondering which way to go."); Whiteford, Taylor & Preston L.L.P., *Employers, Take Note: Your General Release May Not Be as Broad as You Think!* Maryland Employment Law Letter (September 2005) (4th Circuit has "thrown a monkey wrench" into the common practice of providing enhanced severance benefits to departing employees in exchange for a general waiver and release of claims); Judy Greenwald, *Decision Limiting FMLA Waivers Creates Employer Headaches*, Business Insurance (Aug. 8, 2005) (citing authorities that 4th Circuit decision creates a "land mine" for both employers and employees).

Potentially, many thousands of individual employers and individual employees, few having any justiciable controversy, would have to submit their private agreements to the DOL or the courts each year. Most if not all such cases would presumably require some level of detailed inquiry. Neither the agency nor the courts possess the necessary resources for dealing with such an onslaught of new matters, essentially creating controversies where none exist, without sacrificing other important aspects of their work.

Finally, rejection of the Fourth Circuit's rule would not leave employees without legal protection. An employee who waives his or her rights under inequitable circumstances still has a judicial remedy. Any waiver must be knowing and voluntary in order to be enforceable. In any situation where an employer uses unequal bargaining power to apply undue pressure on an employee to sign an agreement against his or her will or without adequate information, courts can and will step in.[11] This safety net for employees also serves as a prophylactic check on any abuses by employers. But in the vast majority of cases, where employers and employees properly agree to an amicable parting, they should be allowed to do so undisturbed.

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11. Employees who qualify for coverage under the Older Workers Benefit Protection Act (OWBPA)—millions of workers who are at least 40 years old—receive the added protection of that statute's requirement that any waiver under the ADEA be knowing and voluntary. The OWBPA sets eight minimum requirements for a release to meet this standard. 29 U.S.C. § 626(f)(1)

CONCLUSION

Congress enacted the FMLA in part to balance workplace demands and family needs "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b)(1), (3). The Fourth Circuit's rule defeats those purposes. This Court should grant the petition to address this issue, as well as to address the issue of the continuing vitality of prior decisions relating to waiver in the FLSA context.

Respectfully submitted,

THOMAS J. WALSH, JR.
FORD & HARRISON LLP
795 Ridge Lake Blvd.
Suite 300
Memphis, TN 38120-9475
(901) 291-1500

EDMUND J. MCKENNA
Counsel of Record
FORD & HARRISON LLP
101 East Kennedy Blvd.
Suite 900
Tampa, FL 33602-5133
(813) 261-7800

Attorneys for Amicus Curiae
North Carolina Retail Merchants Association